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No. 82-15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAY E. OLIVER - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO THE SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 583-4881
Counsel for Petitioner

Of Counsel:

ROBERT L. WILSON
WILSON & SMITH LAW OFFICES
P. O. Box 110
Jamestown, Kentucky 42629

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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IN THE

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No. 82-15

RAY E. OLIVER - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO THE SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Respondent, in its Supplemental Memorandum in Opposition to the Petition for a Writ of Certiorari, has argued that; (1) the Petitioner does not have the requisite standing to raise the issue presented herein, and that (2) even if he did, and even if this Court finds a Fourth Amendment violation in the case of *Florida* v. *Brady*, cert. granted, No. 81-1636 (May 24, 1982), the Petitioner in this case "took no measures to exclude outsiders from entering his property on foot," and that therefore he has waived his right to any Fourth Amendment protections this Court may uphold in its *Brady* decision. Petitioner respectfully submits that neither of these claims present sufficient opposition to this Petition for a Writ of Certiorari.

The Government has supported Petitions for Writs of Certiorari in two similar cases on the same issue presented herein, in *Florida* v. *Brady, supra,* as an Amicus, and in *United States* v. *Dunn,* No. 82-508, as the Petitioner, filed 9-22-82. How can it, in the exercise of sound and logical judgment, in good faith *oppose* this Petition?

I

Respondent claims because the Petitioner leased parts of his land to others to farm and grow corn, that he had no legitimate expectation of privacy, and thus the state troopers' entry did not violate his Fourth Amendment rights. In similar conclusory fashion, Respondent asserts that the Petitioner took no measures to exclude outsiders from entering his property on foot. To the contrary, this Petition for a Writ of Certiorari is replete with substantial evidence of Petitioner's legitimate expectation of privacy. The Respondent's arguments merely beg the issue while overlooking essential facts of this case.

The law certainly does not require landowners to do more than Petitioner had done to secure their privacy:

1. **The troopers entered Petitioner's property by turning on to a road posted with "No Trespassing Signs".**
2. **The troopers proceeded several hundred yards, past Petitioner's residence, ignoring "No Trespassing Signs".**

3. The troopers drove, on Petitioner's property, three-quarters of a mile beyond the Petitioner's home, and encountered a gate.

4. The gate, across the private road, was locked with a chain and padlock, and was posted with a "No Trespassing" sign.

5. After proceeding around this gate, the trespassers were warned, by someone shouting, to proceed no further.

6. The troopers ignored this request and searched further on Petitioner's property.

7. The troopers discovered the field of marijuana in question. This field was not visible from the Cumberland River, which flows beside it, nor from the posted and locked gate, and, of course not from the public roadway. The troopers had trespassed one mile onto Petitioner's property.

These facts lead reasonably to the conclusion that Petitioner Oliver had, in fact, done everything he could have done to secure his privacy.

Respondent cites the case of ***Rakas*** **v.** ***Illinois,*** **439 U. S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978) as authority for the proposition that the Petitioner did not enjoy a legitimate expectation of privacy because he had leased the land to third parties. However,** ***Rakas*** **cannot be cited as authority for this argument which clearly misperceives the facts of this case. Contrary to Respondent's contentions,** ***Rakas*** **held that the definition of the rights described by the concept of**

standing are more properly placed within the purview of substantive Fourth Amendment law than within that of standing:

> Analyzed in these terms, the question is whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect. *Rakas,* 439 U. S. at 140.

The proper analysis of the *Rakas* doctrine centers upon whether or not the Fourth Amendment rights of the Petitioner were violated. The Petitioner's Fourth Amendment rights were, in fact, clearly violated. The Respondent, in its Supplemental Response, is asking this Court to actually rule on the merits of the case before granting Certiorari for a proper consideration of those merits. Respondent's argument would be more properly addressed, according to this Court's holding in *Rakas,* in a full brief on the merits, after Certiorari has been granted.

II

The government has adopted inconsistent positions in regard to this Court's granting Certiorari on the issue presented by this Petition. Certiorari was granted by this Court in the case of *Florida* v. *Brady,* No. 81-1636, on May 24, 1982. Respondent, in its

Memorandum in Opposition and Supplemental Memorandum in Opposition, has pinned many of its hopes on this Court's determination of the "open fields" question in that case. It thus appears that the Respondent would have a substantial interest in the merits of a case surrounding the issue in *Brady,* and presented here. Yet, Respondent, after filing an amicus curiae brief to the *Brady* case, adamantly opposes the efforts of Petitioner Oliver to have the Court review the issue, ostensibly because:

1. If the *Brady* case is decided in their favor, it will be, "a fortiori", the law applicable to this case;
2. If the *Brady* case is *not* decided in their favor, the decision of the Court will not apply to this case because of "factual differences", and
3. The issue, once determined, need not be redetermined.

Respondent should not be allowed to "have its cake and eat it, too." Respondent admits the *Brady* decision will be recognized by it as controlling of the open fields issue ***only if decided in its favor.***

This is not all. On September 22, 1982, long after it asserted the inconsistent positions noted above, Respondent filed a Petition for a Writ of Certiorari on a nearly identical issue in *United States* v. *Dunn,* No. 82-508; 674 F. 2d 1093 (5th Cir. 1982), i.e., "Was the Fourth Amendment violated by law enforcement officers' warrantless entry onto defendant's ranch, in

which they crossed a perimeter fence and another interior fence but did not penetrate the enclosed residence and yard or any other structure?"

Petitioner respectfully submits that the facts of this case present a much clearer issue for review then the facts in *Brady*. *Brady* is prosecuted by the State of Florida, having arisen in that state's court system, the Petitioner's case had its origins and appellate reviews in the federal system. A decision on the merits presented in this case would go much further in resolving the split of authority in the United States Courts of Appeals concerning this issue.

Respectfully submitted,

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 583-4881
Counsel for Petitioner

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ROBERT L. WILSON
WILSON & SMITH LAW OFFICES
P. O. Box 110
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